No. 85-1844

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

F. D.,

Petitioner,

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC. AND
JOHN DOE AND JANE ROE,

Respondents.

Petition For A Writ Of Certiorari
To The Court Of Appeal,
Fourth Circuit, State of Louisiana
And Motion To Vacate The Judgment Below

PETITION FOR WRIT OF CERTIORARI

George T. Mustakas, II
Paula Perrone
3445 North Causeway Blvd.
Suite 715 AAA Building
Metairie, Louisiana 70002
(504) 837-7524

Attorneys for Petitioner,
F. D.

QUESTIONS PRESENTED

I

Whether the State in enacting Louisiana Revised Statute 9:401, 9:402 and 9:404 and 9:422.3-422.10 impermissibly discriminated (and violated the Equal Protection Clause of the Fourteenth Amendment) against that class of parents who contemplate surrender of their children for adoption, for the statutes governing agency adoption do not allow for any rescission of the surrender, whereas the statutes governing private adoption (Louisiana Revised Statutes 9:422.3-422.10) do allow for a 30-day period in which to rescind surrender, and as well mandate that the surrendering parent have legal counsel present at the act of surrender.

II

Whether Louisiana Revised Statutes 9:401, 9:402 and 9:404 (pertaining to agency adoption proceedings) in not providing a parent any period of time in which to rescind the surrender of his or her child to an adoption agency, and in terminating at the time of the surrender all rights of the parent to appear and object to any adoption proceedings or to appear at any other proceedings involving the welfare and placement of the child, or to even be notified of said proceedings, deny the petitioner due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the U. S. Constitution and by the Constitution of the State of Louisiana.

PARTIES

F. D. is a person of the full age of majority and domiciled in the Parish of Orleans, State of Louisiana.

Associated Catholic Charities of New Orleans, Inc. is a non-profit corporation licensed by the State of Louisiana as an adoption agency and having its principal place of operation in the Parish of Orleans, State of Louisiana.

John Doe and Jane Roe, upon information and belief, are two married individuals, both of the age of majority and residing in the greater metropolitan New Orleans area, State of Louisiana.

TABLE OF CONTENTS

Page:

Questions Presented i

Listing of Parties ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana And Motion to Vacate the Judgment Below 1

Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 10

Reasons for Granting the Writ 12

Conclusion 20

Certificate of Service 21

TABLE OF CONTENTS (Continued)

Page:

Appendix:

1. Denial of Writs of Certiorari and Review by the Supreme Court of Louisiana A-1

2. Opinion of the Court of Appeal, Fourth Circuit, State of Louisiana A-2

3. Judgment of the Civil District Court for the Parish of Orleans A-8

TABLE OF AUTHORITIES

Pages:

Cases:

Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed. 2d 297 (1979) 16

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 19

Handley, By and Through Herron v. Schweiker, 697 F.2d 999 (1983) 15

Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed. 2d 363 (1974) 15

Little v. Streater, 101 S.Ct. 2202 (1981) 18

Mathews v. Eldridge, 96 S.Ct. 893 (1976) 17, 18

Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 2d 1042 (1923) 15

Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549 at 1555, 71 L.Ed. 2d 770 (1982) 13

Quilloin v. Wilcott, 98 S.Ct. 549 (1978) 15

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971) 16

Rivera v. Marcus, 696 F.2d 1016 (1982) 17

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973) 15

TABLE OF AUTHORITIES (Continued)

Pages:

Cases:

Santosky v. Kramer, 102 S.Ct. 1388 (1982) 15,17

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972) 15, 19

Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 92 St.Ct. 1400, 31 L.Ed. 2d 768 (1972) 15

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972) 15

CONSTITUTION, STATUTES AND REGULATIONS:

Constitution of the United States
Amendment V 2
Amendment XIV 3

Louisiana Constitution, Article 1
Section 1. 3
Section 3. 3

Louisiana Revised Statutes
9:401-402, 404 4
9:422.3 - 422.10 5

15 U.S.C. 1635 19

28 U.S.C. 1257 (3) 2

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

F. D.,

Petitioner,

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC. AND
JOHN DOE AND JANE ROE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA AND MOTION TO VACATE THE JUDGMENT BELOW

The petitioner, F. D. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, entered in this proceeding on December 11, 1985 and moves this Honorable Court to vacate that judgment.

OPINION BELOW

The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, appears in the Appendix hereto. The judgment of the Civil District Court for the Parish of Orleans also appears in the Appendix together with the writ denial by the Supreme Court of Louisiana.

JURISDICTION

The judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, was rendered on December 11, 1985. A Petition for Writ of Certiorari was timely filed with the Supreme Court of Louisiana, but writs were denied on February 7, 1986. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3). The federal questions of petitioner's due process and equal protection rights being violated were raised at the trial level proceedings in the Civil District Court for the Parish of Orleans, as well as in the Court of Appeal, Fourth Circuit, State of Louisiana and the Supreme Court of Louisiana proceedings.

STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION. Amendment V.

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION. Amendment XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CONSTITUTION, ARTICLE 1

SECTION 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolated by the state.

SECTION 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and

involuntary servitude are prohibited, except in the latter case as punishment for crime.

LOUISIANA REVISED STATUTES 9:401-402, 404

§401. Definitions

As used in this Part:

(1) "Agency" means the state department of public welfare or an agency or institution licensed by the state department of public welfare for the placement of children for adoption.

(2) "Child" means a child under seventeen years of age.

(3) The singular includes the plural, the plural the singular, and the masculine the feminine, when consistent with the intent of this Part.

§402. Voluntary surrender of custody of child; procedure

Any parent of a child, whether the child was born in wedlock or out of wedlock and whether the parent is over or under twenty-one years of age, may surrender the permanent custody of his child to an agency for the purpose of having the child adopted by appearing before a notary and two witnesses and declaring that all of his rights, authority, and obligations, except those pertaining to property, are transferred to the agency. This authentic act shall be signed by the agency and shall constitute a transfer of custody to the agency after which the agency shall act in lieu of the

parent in subsequent adoption proceedings. No surrender of the custody of a child shall be valid unless it is executed according to the provisions of this Part.

§404. Effect of voluntary surrender or decree of abandonment of child

A surrender by the mother of a child born out of wedlock who has not been formally acknowledged or legitimated by the father terminates all parental rights except those pertaining to property. The same shall be true as to a court order of abandonment. However, no surrender or court order of abandonment as to only one living parent of a legitimate child shall be binding upon the other living parent.

LOUISIANA REVISED STATUTES 9:422.3-422.10

§422.3. Voluntary surrender of custody of child for private adoption

The parent or parents of a child, whether the child is born in wedlock or out of wedlock and whether the parent is over or under eighteen years of age, may execute an authentic act of voluntary surrender of custody of the child for private adoption. The formal act shall be evidence of a legal and voluntary surrender only if it is executed in accordance with the provisions of this Subpart. The provisions of this Subpart shall be inapplicable where custody of the child has been removed by court order and placed with the Department of

Health and Human Resources and the parent or parents shall have no capacity to execute an authentic act of voluntary surrender of custody as provided for in this Subpart. Nothing in this Subpart, however, shall alter the provisions for or the effects of a voluntary surrender to an agency.

§422.4. Persons authorized to surrender child for private adoption.

The father and mother indicated on the certified copy of the child's birth certificate provided in R.S. 9:422.2 must join in signing the authentic act of surrender of that child. If the father of the child is not indicated, the mother may sign the authentic act of surrender alone. Should the indicated parent or parents be under the age of eighteen at the time of signing of the act of surrender, the parents of the indicated parent or parents must also sign the act of surrender; if said parents are legally separated or divorced or one is deceased, in that case the parent with custody or the living parent must sign the act; if the surrendering parent or parents are under a guardianship, said guardian should sign the act.

§422.5. Surrender to adoptive couple or their representative

The voluntary surrender may be made only to a person or couple qualified to petition for the adoption of the child and only for the purpose of actually adopting the child; provided, however, that the prospective adoptive parent

or parents may be represented in the act of surrender as provided in this Part.

§422.6. Formal act of surrender; contents

The formal act of surrender shall identify the parents or parent of the child by name, parish of domicile, age, and marital status; shall identify the child and the parish of birth of the child; shall indicate the name and address of the person or persons to whom the surrender is made, or the name and address of the representative of that person or persons; and shall recite: (1) the date of birth of the child to be surrendered and that the act is not signed earlier than the fifth day following that date; (2) that the parent or parents freely and voluntarily surrender custody of the child for the purpose of private placement and adoption; (3) that the parent or parents consent to the adoption; (4) that the parent or parents have been informed and understand that their rights as parents of the child are to be terminated, and (5) that notice and service of any pleading of any sort in any subsequent adoption proceeding is waived. Should a surrendering parent of the child be under the age of eighteen at the time of signing, the formal act shall also recite that fact and shall state that the surrendering parent under the age of eighteen is joined in signing the formal act of surrender by those individuals indicated in R.S. 9:422.3. Each necessary party must sign in the presence of a notary and two witnesses, although it is not necessary that they sign the same instrument.

§422.7. Time at which formal act of surrender may be executed

The formal authentic act of voluntary surrender shall not be signed earlier than the fifth day following the date of the birth of the child to be surrendered. The surrendering parent or parents shall be represented by an attorney at the execution of the act of surrender.

§422.8. Effect of formal act of surrender

The formal act of voluntary surrender grants the legal custody of the child identified in the act to the person or persons named or represented in the act. Further, the formal act of voluntary surrender grants the irrevocable consent, except as specifically provided in R.S. 9:422.10, of the surrendering parent or parents to the adoption of a child by the person or persons named or represented in the act. Should there be only one parent indicated on the birth certificate referenced in R.S. 9:422.2, the surrender by that parent alone terminates all parental rights whatsoever, except as provided in R.S. 9:422.10.

§422.9. Anonymity of parents and adoptive parents protected

The formal act of voluntary surrender need not name the person or persons who are to become the adoptive parent or parents of the child surrendered. An attorney at law may be named in the act of surrender as the represent-

ative of the prospective adoptive parent or parents. Likewise, the prospective adoptive parent or parents need not be informed of the identity of the surrendering parent or parents or be shown the petition or supporting exhibits or other documents connected with the adoption proceeding.

§422.10. Opposition to adoption; revocation of consent

The parents executing the act of legal surrender, acting jointly or individually, may oppose the adoption of the child surrendered only by a clear, written declaration of the revocation, made within thirty days after executing the formal act of surrender. The writing must reasonably identify the child surrendered and the act of surrender; attaching a copy of the act of legal surrender being sufficient. A copy of the writing must be sent by certified or registered mail to the person or persons, or their representative, identified in the act of surrender to whom the custody of the child was granted to be of any effect. Proof of actual receipt of the writing must be made by an affidavit of mailing with signed return receipt attached or by other proof as in a civil trial. Should there be only one parent indicated on the birth certificate referenced in R.S. 9:422.2 and that parent alone has executed the legal act of surrender, then the nonindicated parent may oppose the adoption only by proof of the legal and formal acknowledgement or legitimation of the child by that parent prior to the entering of a decree

of adoption. The rights and procedures in this Section are exclusive.

STATEMENT OF THE CASE

Petitioner, F. D., gave birth to a child out of wedlock. One month later while under the continuing influence and counselling of Associated Catholic Charities of New Orleans, Inc. on February 24, 1984, she executed, before a Notary Public, an act of surrender, surrendering custody of her child to Associated Catholic Charities of New Orleans, Inc. (ACC), a licensed adoption agency under the laws of Louisiana.

On March 22, 1984, petitioner notified ACC by certified mail that she intended to revoke her surrender and regain custody of the child. Because the law regulating agency adoptions, La. R.S. 9:401, 9:402 and 9:404, does not provide for the revocation of consent after a surrender of a minor child to an agency, but rather irrevocably terminates all of the surrendering parent's rights, F. D. was not given back her child.

F. D. then filed a writ of habeas corpus in Orleans Parish Civil District Court. ACC and John Doe and Jane Roe as the married couple who received physical custody of the child from ACC, were named as defendants.

F. D. alleged in her petition that there was a vitiation of consent by duress and the unconstitutionality of La. R.S. 9:401, 9:402 and 9:404. Respondents filed an Exception of No Cause of Action.

The trial court, through Judge Louis Di Rosa, granted judgment in favor of ACC dismissing plaintiff's suit for failure to state a cause of action upon which relief could be granted. F. D. appealed this decision. The Court of Appeal,

Fourth Circuit, State of Louisiana, affirmed the trial court's exception of No Cause of Action and the Supreme Court of Louisiana denied writs.

REASONS FOR GRANTING THE WRIT

"A mother is a mother still, the holiest thing alive."

Coleridge

Ageless, timeless is a child's love for his mother. Such a bond created is sacrosanct, the severance of which should fall under the strictest of scrutinies.

The questions presented in this petition for writ of certiorari are ones which must, of necessity, balance countervailing interests: those of the natural mother, those of the State, and those of prospective adoptive parents.

There can be no argument that adoption procedures promulgated must insure prospective adoptive parents the maximum degree of certainty that a child, once placed with them, will not be wrenched from their arms without compelling circumstances. However, the fundamental liberty interest guaranteed by the U.S. Constitution mandates procedural and substantive safeguards for the surrendering parent, safeguards which were not afforded the petitioner herein.

I.

The State in enacting Louisiana Revised Statutes 9:401, 9:402 and 9:404 and 9:422.3-422.10 impermissibly discriminated (and violated the Equal Protection Clause of the Fourteenth Amendment) against that class of parents who contemplate surrender of their children for adoption, for the statutes governing agency adoption do not allow for any rescission of the surrender nor mandate legal counsel, whereas the statutes governing private adoption (Louisiana Revised Statutes 9:422.3-422.10) do allow for a 30-day period in

which to rescind surrender, and as well require that the surrendering parent have legal counsel present at the act of surrender.

In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549 at 1555, 71 L.Ed. 2d 770 (1982), this Court judicially recognized the state of mind of an unwed mother at the time of birth:

> Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of paternity suit within 12 months of birth.

In *Mills*, this Court found that the State's interest in preventing stale or fraudulent paternity claims could not justify a one-year prescriptive period when the State allowed claims for support during the entire minority of a legitimate child.

In the case at bar, the State has established a different statutory procedure for the parent surrendering his or her child to an agency than for the parent surrendering to a private individual.

The State has afforded a parent who privately places his or her child for adoption with a means by which to revoke the surrender by notifying in writing, within 30 days of the surrender, the private party in whose custody the child remains. Further, the surrendering parent is required to have legal counsel present at the execution of the act of surrender, under penalty of nullity.

No such safeguards are present in the statutory procedure governing agency adoptions. Once the act of surrender is executed, it irrevocably terminates all parental rights.

The only means of invalidating such a surrender is by alleging fraud or duress, which was done in the instant case in paragraph of F. D.'s petition for habeas corpus; however, the below quoted allegations, on their face, were not found sufficient to justify a "vice of consent".

"PARAGRAPH IV.

> For the thirty-day period following the birth of her daughter, A. C. D., petitioner, F. D., was in a state of extreme distress about the prospect of giving the child up for adoption and was constantly during this thirty-day period being counseled by representatives of the defendant, Associated Catholic Charities of New Orleans, Inc. to give the child up for adoption, being told information as to how financially able to care for the child the adoptive parents were, what good parents they would be, all of which put the petitioner in a state of confusion, ambivalence and guilt over keeping the child. Finally, on February 24, 1984, petitioner executed an authentic act of "Voluntary Surrender", such execution being under extreme duress, thereby vitiating F. D.'s consent and nullifying the "voluntary surrender" act."

Herein presented is the classic case of a state law which conclusively denies to one subclass of individuals (natural parents surrendering their children to agencies) benefits which are available to another subclass (natural parents sur-

rendering their child to private parties). It is submitted that the statute governing surrender for agency adoption purposes must fall as unconstitutionally depriving petitioner of equal protection under the law. *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed. 2d 363 (1974); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972); *Handley, By and Through Herron v. Schweiker*, 697 F.2d 999 (1983).

It must be held that the surrender scheme places such an insurmountable barrier upon the petitioner as to unconstitutionally deprive her of her equal protection rights. For the test here, due to the fact that there is at stake a fundamental liberty interest, is one of strictest scrutiny.

The strict scrutiny test has been used when determining issues involving religion, race, national origin and fundamental rights. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

This Court in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972), *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972), *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 2d 1042 (1923), *Quilloin v. Wilcott*, 98 S.Ct. 549 (1978) and in myriad other decisions has held that an individual is guaranteed the freedom of personal choice in family matters, and in particular, the custody, care and nurture of one's child. Therefore, the state of Louisiana must show a compelling state interest for the statute to withstand strict scrutiny. And the state not only has not done so, but cannot do so. For unless and until there is some allegation of unfitness of a parent, the State as *parens patriae* must favor preservation, not severance of natural familial bonds. *Santosky v. Kramer*, 102 S.Ct. 1388 (1982).

Even if this Honorable Court were to find that the different treatment and classification of parents surrendering children for adoption was not subject to strict scrutiny, the "substantial relationship" test in the alternative should apply. *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed. 2d 297 (1979); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971).

Even still, the state cannot justify the disparity in treatment because the classification bears no fair and substantial relationship to the object of the legislation. Obviously, agencies don't need protection; natural parents contemplating surrender of their children (especially unwed mothers immediately after the birth of their children) do.

For these reasons, the Louisiana Statutes governing surrender of children to adoption agencies must be invalidated on equal protection principles.

II.

Louisiana Revised Statutes 9:401, 9:402 and 9:404 (pertaining to agency adoption proceedings) in not providing a parent any period of time in which to rescind the surrender of his or her child to an adoption agency, and in terminating at the time of the surrender all rights of the parent to appear and object to any adoption proceedings or to appear at any other proceedings involving the welfare and placement of the child, or to even be notified of said proceedings, deny the petitioner due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and by the Constitution of the State of Louisiana.

The requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it is the very essence of due process. *Mathews v. Eldridge*, 96 S.Ct. 893 (1976).

The beauty of the due process guarantee is that it is flexible enough to encompass a variety of circumstances and to mandate the creation of a panoply of safeguards to protect an individual's liberty and property interests.

This Court has on numerous occasions recognized the liberty interests of parents in the care and custody of their child. *Santosky v. Kramer*, 102 S.Ct. 1388 (1982). It may be argued that a forced taking of a child by the State is distinguishable from the case herein where an unwed mother "voluntarily" executed an act of surrender.

However, it is submitted that an irrevocable act of surrender on a pre-printed form, executed in front of a notary employed by the adoption agency, afforded no meaningful opportunity to the petitioner to understand the full consequences of her actions. These facts, coupled with judicial recognition of the state of mind of an unwed mother following the birth of her child, seriously call into question whether such a surrender and the concomitant waiver of all rights to the custody of the child was knowingly, voluntarily and intelligently executed.

In *Rivera v. Marcus*, 696 F.2d 1016 (1982), the Second Circuit U.S. Court of Appeals addressed the same issue at bar. Ms. Rivera was found in that case to be deprived of her due process rights when she was not provided with timely and adequate notice of reasons for the termination of a foster care agreement nor an opportunity to confront and cross-examine witnesses.

Ms. Rivera had voluntarily executed a foster care agreement with the state welfare department which agreement authorized the state to remove the children from her foster home at any time, without a prior hearing. In the instant case, F. D. executed a surrender which effectively emasculated all of her parental rights without a hearing, but should have been afforded one.

In *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), this Court has held that:

> Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Clearly, in the case at bar the factors enunciated above in *Mathews* can be readily ascertained: the substitute procedural safeguards are already in place and operating pursuant to La. R.S. 9:422.3 - 9:422.10, the statutes governing parental surrender to private parties.

In a country where liberty and property interests have been zealously protected by the due process clause in such diverse instances as proceedings involving termination of social security benefits, *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), defense of paternity litigation where the indigent father was afforded blood grouping tests at the State's expense, *Little v. Streater*, 101 S.Ct. 2202 (1981), the taking of property

burdened with a mortgage wherein the debtor had executed a waiver of all notice requirements, *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), it seems inconceivable that we would not accord to a mother some procedural safeguards when she is confronted with the most difficult of decisions: the surrendering of her flesh and blood to another party.

While *Stanley v. Illinois*, 92 S.Ct. 1208 (1972), stands for the legal proposition that a hearing is not required in every case where the State seeks to impair a private interest, it also holds that:

> The Constitution recognized higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

We live in a society where Congress promulgates legislation protecting consumers to such an extent that they have a three-day cooling-off period within which to cancel certain transactions. 15 U.S.C. 1635.

Can this Court turn its back on an admittedly vulnerable class of persons, unwed mothers contemplating surrender to an agency, and not afford them some measure of time in which to reflect upon the wisdom of their decision, some semblance of due process in order to effect a change of heart? In the safeguarding of our most fundamental of liberty interests, this Court must not.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana.

Respectfully submitted:

GEORGE T. MUSTAKAS, II

George T. Mustakas, II

Suite 715, AAA Building
3445 N. Causeway Boulevard
Metairie, Louisiana 70002
Telephone: (504) 837-7524

PAULA PERRONE

Paula Perrone

Suite 715, AAA Building
3445 N. Causeway Boulevard
Metairie, Louisiana 70002
Telephone: (504) 837-7524

ATTORNEYS FOR PETITIONER,
F. D.

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition of Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

HENICAN, JAMES & CLEVELAND
Melanie Shaw
111 Veterans Boulevard, Suite 1200
Metairie, Louisiana 70005

George T Mustakas, II pmc
GEORGE T. MUSTAKAS, II

Paula Perrone
PAULA PERRONE

DATED: May 7, 1986

APPENDIX

APPENDIX

THE SUPREME COURT OF THE STATE OF LOUISIANA

F. D.

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

No. 86-C-0074

Re: F. D., applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, No. 3536-CA; Parish of Orleans Civil District Court Div. "D" No. 84-10738.

February 7, 1986

Denied.

FAB
JAD
PFC
WFM
JLD
JCW
HTL

Court of Appeal
Fourth Circuit
Filed February 10, 1986
/s/ Danielle Schott
Clerk of Court

Supreme Court of Louisiana
February 7, 1986

/s/ Frans J. LaBranche, Jr.
Clerk of Court
For the Court

A-2

RECORD

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

F. D.

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

NO. CA-3536

AN APPEAL FROM THE
CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 84-10738
HONORABLE LOUIS DiROSA
JUDGE

JAMES C. GULOTTA
JUDGE

GARRISON, J., DISSENTS WITH WRITTEN REASONS

(Court composed of Chief Judge William V. Redmann, Judges James C. Gulotta and Jim Garrison)

Ms. Paula A. Perrone
3445 N. Causeway Boulevard
Suite 715
Metairie, Louisiana 70002
Attorney for Appellant

Ms. Melanie Shaw
P. O. Box 19300
New Orleans, Louisiana 70179
Attorney for Appellees

December 11, 1985

AFFIRMED

Plaintiff, an unwed mother who surrendered her natural child to a licensed adoption agency, appeals from a dismissal, on an exception of no cause of action, of her habeas corpus petition to regain permanent custody of the child.[1] We affirm.

On February 24, 1984, plaintiff signed a notarial act surrendering her one-month old dauthter to Associated Catholic Charities of New Orleans, Inc., a state-licensed adoption agency. On March 22, 1984, however, she informed A.C.C. by certified mail that she desired to revoke her consent. Upon defendant's refusal to return the child, plaintiff filed a petition for writ of habeas corpus.

Plaintiff seeks to annul her act of "voluntary surrender" for lack of consent and, further, to have the surrender of children to licensed adoption agencies (R.S. 9:401 - 9:407)

---

1. To preserve the privacy of the individuals involved, we have deleted all references to personal identities in this opinion.

declared unconstitutional as violative of her rights of due process and equal protection of the laws. The gist of plaintiff's constitutional attack is that the statutory scheme for agency adoptions, unlike the statutes authorizing private adoptions (LSA-R.S. 9:422 et seq.), provides no time period for a parent to revoke her act of surrender and makes no provision for representation of the natural parent by legal counsel at the time of execution of the authentic act of surrender.

A natural parent's act of surrender of a child under LSA-R.S. 9:402 must be free of any fraud or vice of consent. *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951); *Golz V. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976); *Allen v. Volunteers of America*, 378 So. 2d 1030 (La. App. 2nd Cir. 1979), writ denied 381 So. 2d 509 (La. 1908). Where the natural parent sufficiently alleges that she has surrendered her child under such pressure and coercion, she states a cause of action entitling her to offer evidence in support of those allegations. *Ball v. Campbell*, supra. Nonetheless, an unwed mother's vacillation in deciding whether or not to surrender her child, though indicative of her torment and heightened emotions about her dilemma, does not necessarily prove that her consent to the surrender was legally viatited. See *Allen v. Volunteers of America*, supra.

In the instant case, the supplemental and amending petition alleges, in pertinent part:

> "For the thirty-day period following the birth of her daughter . . . petitioner . . . was in a state of extreme distress about the prospect of giving the child up for adoption and was constantly during this thirty-day period being counseled by representatives of the defendant, Associated Catholic Charities of New Orleans, Inc. to give the child up for adoption, being

> told information as to how financially able to care for the child the adoptive parents were, what good parents they would be, all of which put the petitioner in a state of confusion, ambivalence guilt [sic] over keeping the child. Finally, on February 24, 1984, petitioner executed an authentic act of 'Voluntary Surrender', such execution being under extreme duress, thereby vitiating . . . consent and nullifying the 'voluntary surrender' act."

Considering these allegations, we conclude that plaintiff has failed to state a cause of action entitling her to annul the act of surrender for a vice of consent. Plaintiff factually alleges only that the adoption agency's representatives counseled her over a thirty-day period to give the child up for adoption by informing her that the adoptive parents would be good persons and financially able to care for the child. Although the mother further alleges that she was in a state of "extreme distress" and that counseling confused her and made her feel ambivalent and guilty, such vacillation and torment over her decision do not constitute a vice of consent. See *Allen v. Volunteers of America*, supra. Furthermore, plaintiff's remaining conclusory allegation that her execution of the authentic act of surrender was under "extreme duress" vitiating and nullifying her consent is unsupported by factual allegations. Accordingly, we conclude the trial judge properly maintained the exception.

We further reject plaintiff's constitutional attack. In *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976), the Louisiana Supreme Court held that the statutory procedure for agency adoptions does not violate due process of law by failing to afford a natural parent legal counsel or a judicial hearing before the surrender of parental rights in a formal instrument.

Plaintiff raises equal protection arguments in the instant case. Because we conclude a rational basis exists for the Legislature to treat the requirements for an agency adoption and a private adoption differently, we conclude no constitutional impairment exists based on lack of equal protection. Private adoptions are not clothed with safeguards that exist in a state licensed and regulated agency, and one can reasonably conclude that greater abuse might occur in a private adoption setting than in an agency one. Therefore, more strigent requirements, as determined by the Legislature in private adoptions, clearly have a rational basis.

Because these differences in procedure between private and agency adoptions are founded on real distinctions and are not arbitrary or irrational, we conclude they further a legitimate state purpose. LSA-Const. Art. 1 §3; *R. J. D'Hemecourt Petroleum v. McNamara*, 444 So. 2d 600 (La. 1984), certiorari denied _____ U.S. _____ , 105 S.Ct. 92, 83 L.Ed. 2d 39 (1984); *Harry's Hardware Inc. v. Parsons*, 410 So. 2d 735 (La. 1982), certiorari denied 459 U.S. 881, 102 S.Ct. 178, 74 L.Ed. 2d 145 (1984). Furthermore, a mother is free to choose whether she decides to surrender or not surrender the child and whether she prefers an agency or private adoption if indeed she wants to surrender the child.

For these reasons, we conclude R.S. 9:401 - 9:407 are not violative of the equal protection guarantees provided for in the United States and Louisiana constitutions.[1]

---

1. U.S.C.A. Const. Amend. 14; LSA-Const. Art. 1, §3.

Accordingly, the judgment is affirmed.

AFFIRMED

A TRUE COPY
New Orleans, February 10, 1986
/s/ S. McCausland, Dy.
Court of Appeal, Fourth

REHEARING NOT APPLIED FOR

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

F. D.
versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

NO. CA-3536

GARRISON, J., DISSENTS:

Plaintiff, an unwed mother, executed an act of "voluntary surrender" of her child (approximately 4 weeks after its birth) to Associated Catholic Charities of New Orleans, Inc. A month later she informed the Association that she intended to revoke her consent and regain the child's custody. The trial court has held that she cannot do so. The majority of this panel affirms that judgment. I disagree.

In the full context of the circumstances, it is apparent that consent – in the sense of being a free and deliberate exercise of will – was lacking when plaintiff surrendered her child. See Article 1819 of the Civil Code regarding facts vitiating consent.

In determining if there existed vice in the consent the age, sex, health, temper, disposition of the party and other circumstances must be taken into consideration. Article 1851.

Under the circumstances of her surrender of her child a mere 4 weeks after its birth, it is inconceivable that this young unmarried mother was not overwhelmed by anxiety,

guilt and concern for the child's support. Consequently, I find the requirement of consent in the transaction to be absolutely lacking. Furthermore, in my judgment, the complete absence of a time period in which to revoke her consent and of the provision of legal counsel for her represent an application of a law which is inhumane to the point of being primitive.

Consequently, in addition to the clear absence of consent as a factual matter, it appears to me that Revised Statutes 9:401-407 – to the extent to which they apply to this case – are manifestly unconstitutional as violations of plaintiff's right to due process. They are unconstitutional because they deny to a woman in the plaintiff's circumstances the right to revocation and the right to counsel on the ground that an adoption agency is involved, whereas in a private non-agency adoption there would be available to her such safeguards. Revised Statutes 9:422.7 and 9:422.10.